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Supreme Court, U.S.
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UNITED STATES SUPREME COURT

October 1998 Term

ERIC DAVENPORT, Petitioner,

vs.

COMMUNITY CORRECTIONS OF THE PIKES PEAK REGION, INC., Defendant.

On Petition for Writ of Certiorari to the Colorado Supreme Court

APPENDIX FOR PETITION FOR WRIT CERTIORARI

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Index for Appendix: **Page**

OPINION OF THE COLORADO SUPREME COURT REPORTED AT 962 P.2D 963 (Colo. 1998)……...1

OPINION OF THE COLORADO COURT OF APPEALS RE-SPORTED AT 942 P.2D 1301 (Colo. App. 1997)……..2

ORDER ON REHEARING……..26

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE WITH APPROPRIATE CITATIONS……..28

PROVISIONS OF UNITED STATES CONSTITUTION……..28

PROVISIONS OF COLORADO CONSTITUTION……..29

PROVISIONS OF COLORADO STATUTES……..32

OPINION OF THE COLORADO SUPREME COURT REPORTED AT 962 P.2D 963 (Colo. 1998):

SUPREME COURT, STATE OF COLORADO
NO. 97SC 266

ERIC DAVENPORT,

Petitioner,

v.

COMMUNITY CORRECTIONS OF THE PIKES PEAK REGION, INC.,

Respondent.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT AFFIRMED

June 29, 1998

As Modified on Denial of Rehearing July 27, 1998.

We granted certiorari to review the court of appeals decision in *Davenport V. Community Corrections of the Pikes Peak Region, Inc.*, 942 P.2d 1301 (Colo. App. 1997), to consider whether the court of appeals erred in concluding as a matter of law that a private community corrections facility has neither a statutory nor common law duty to protect an individual from the conduct of an offender sentenced to the facility. The court of appeals reversed a jury verdict awarding the plaintiff damages for injuries sustained in an automobile accident involving a community corrections resident. We affirm.

I.

Community Corrections of the Pikes Peak Region, Inc. (Pikes *Peak)* , is a private non-profit corporation that operates a community. corrections facility in Colorado Springs pursuant to a contract with the Division of Criminal Justice of the Colorado Department of Public Safety. Offenders housed at Pikes Peak are required to maintain steady employment, undergo random drug and alcohol testing, pay rent on a weekly basis, and attend budgeting classes. Pikes Peak participants are only permitted to leave the facility for work, job searching, or pursuant to a valid curfew, weekend, church, overnight, or furlough pass.

On April 21, 1966, Fred Rutledge was sentenced directly to community corrections for eight years after being convicted of second degree burglary. As a condition of his sentence, Rutledge was ordered to undergo treatment for alcohol abuse. Rutledge was admitted to Pikes Peak on April 28, 1968. On several occasions during his eight and one-half month stay at Pikes Peak, Rutledge violated rules pertaining to the administration Qf the facility. Specifically, Rutledge (1) was late signing in; (2) failed to take anta-

buse on three occasions;[1] (3) failed two drug tests; (4) twice tested positive for alcohol;[2] and (5) was involved in a careless driving incident. Although these offenses were classified by Pikes Peak as major offenses which could, depending upon the severity and circumstances of the offense, result in notification to the sentencing judge, the sentencing judge was never notified.

On January 14, 1989, Rutledge was permitted to leave Pikes Peak on a weekend pass. Rutledge went to the house of Eric Davenport, a friend and former resident at Pikes Peak. At the house, Rutledge and Davenport began drinking beer. Later, they left in Rutledge's car, which Rutledge drove.[3] After stopping at a liquor store, Rutledge drove at a high rate of speed and rolled the automobile. Davenport suffered permanent de-

1 Antabuse contains the drug disulfiram, which produces a severe adverse physical reaction when mixed with alcohol. Antabuse is used to create an aversion to alcohol in the treatment of chronic alcoholism.

2 One of the two tests revealed that Rutledge's blood alcohol content was 0.27. On the night of that test, Rutledge apparently drove himself and two other residents back to pikes Peak following a disagreement with his ex-wife. Following an administrative hearing, Rutledge was placed on fourteen days' disciplinary restriction, ordered to perform ten hours of extra duty, and lost seven days of good time credit.

3. Prior to being allowed to drive a vehicle, offenders housed at Pikes Peak had to obtain driving authorization. This process required production of a valid license, driving *record*, ownership information, and proof of insurance. Although Rutledge had received authorization from Pikes Peak to drive three separate vehicles, the vehicle Rutledge was driving on the night in question was apparently not authorized by Pikes Peak.

bilitating injuries in the accident.[4] Rutledge was arrested and charged with vehicular assault, reckless driving, driving under the influence, driving with excessive alcohol content, driving with an expired temporary registration, and driving without compulsory insurance. Rutledge was subsequently terminated from the Pikes Peak program.

On July 13, 1990, Davenport sued Pikes Peak for negligent supervision of Rutledge. In responding to the complaint, pikes Peak designated Rutledge as a non-party at fault pursuant to section 13-21-111.5, 6A C.R.S. (1987). On March 20, 1992, Pikes Peak filed a motion for summary judgment, asserting that Pikes Peak owed no legal duty to Davenport as a matter of law. The trial court denied the motion, concluding that "there is a duty upon entities such as [Pikes Peak] to exercise reasonable care to protect members of the public from harm caused by persons' in their custody.

Following a trial, the jury found Pikes Peak ninety percent at fault for Davenport's injuries and allocated the remaining ten percent of fault to Rutledge. No fault was assigned to Davenport. The jury then assessed economic damages at $435,000, disfigurement damages at $10,000, and non-economic damages at $1,468,000. After reducing the assessed non-economic damages to ~250,000 pursuant to section 13-21-102.5, 6A C.R.S. (1967), the trial court entered judgment for Davenport against Pikes Peak in the amount of $625,500, representing ninety percent of the total damages assessed.

The court of appeals reversed, concluding as a matter of law that Pikes Peak owed no duty to protect Davenport from Rutledge's conduct. Specifically, the court of appeals determined that the statutes governing community corrections did

4. Following the accident, Rutledge had a blood alcohol content of *0.141*

not impose a statutory duty on Pikes Peak to protect members of the public from offenders participating in the program. Additionally, the court of appeals concluded that Pikes Peak owed no common law duty to protect Davenport from Rutledge's conduct. Because it determined that no duty existed, the court of appeals remanded the case to the trial court with directions to dismiss Davenport's complaint.

II.

To recover on a claim of negligence, the plaintiff must establish the existence of a legal duty on the part of the defendant breach of that duty by the defendant, causation, and damages. *See Observatory Corp. v. Daly*, 780 P.2d 462, 465 (Colo. 1989). The initial determination of whether a defendant owes a duty to the plaintiff is a question of law to be considered by the court. *See Casebolt v Cowan*, 829 P.2d 352, 356 (Colo. 1992). A negligence claim must fail if it is based upon circumstances for which the law imposes no duty of care upon the defendant. *See University of Denver v. Whitlock*, 744 P.2d 54, 56 (Colo. 1987).

In this case, Davenport challenges the court of appeals' decision as it relates to two different issues concerning pikes peak's duty. We address each issue separately.

A. Statutory Duty

Davenport argues that the legislative scheme authorizing community corrections supports the imposition of a duty of care on Pikes Peak. We disagree.

A legally imposed duty of care may be derived from a legislative enactment. *See Leake v. Cain*, 720 P.2d 152, 162 (Colo. 1986). In this regard, a duty of care is established where the plaintiff is a member of the class the statute was designed to protect, and where the injury suffered is the type of injury which the statute was enacted to prevent. *See id.*

Section 17-27-101, 8A C.R.S. (1989 Supp.),

in effect at the time of the accident, provides as follows:

> (1) It is the purpose of this article to encourage flexibility in the development of community correctional facilities and programs by the department, units of local government, and nongovernmental agencies and to encourage the use of such facilities and programs by sentencing courts. It is the further purpose of this article to provide a procedure through which units of local government and nongovernmental agencies may provide adult services to the department and to sentencing courts.
>
> (2) It is the intent of the general assembly that community correctional facilities and programs be used to protect the public safety by serving the following purposes:
>
> (a) With respect to offenders sentenced to community corrections by the courts, to provide a sentencing option and to increase the potential for victim restitution and offender access to rehabilitation programs;
>
> (b) With respect to offenders transferred to community corrections by the department of corrections for long-term placement, to provide the least restrictive and least expensive custodial setting for such offenders;
>
> (c) With respect to other offenders transferred to community corrections by the department of corrections for short-term prerelease placement, to provide programs to effectuate the reintegration of such offenders into the community and to ensure that such offenders have the opportunity for transitional community placement before their release from custody.

Additionally, section 17-27-114(1), 8A C.R.S. (1986), provided that,

> [w]here the administrator of a community

> correctional facility ... has cause to believe that an offender placed in a community correctional facility has violated any rule or condition of his placement in that facility or cannot be safely housed in that facility, the administrator ... shall certify to the appropriate judicial or executive authority the facts which are the basis for his belief and execute a transfer order . . . to transport the offender to the county jail in the county in which the facility is located where he shall be confined pending a determination by the appropriate court or executive authorities as to whether or not the offender shall remain in community corrections.

The legislative scheme authorizing the use of community corrections explicitly provides that one of its goals is to promote public safety. *See* § 17-27-101(2) Contrary to Davenport's arguments, however, the community corrections statutes are not designed to protect the public from the immediate threat posed by participating offenders.[5] Instead, community corrections promote long-term public safety by gradually reintegrating the offender into society using nontraditional rehabilitation techniques. *See* § 17-27-101(2); *Wilson v. People*, 747 P.2d 638, 640 (Colo. 1987). Furthermore, although section 17-27-114(1) requires community corrections administrators to report violations of placement conditions, the court of appeals correctly notes that any duties created by that obligation were owed directly to the relevant judicial or executive authorities" and not the general public. *See*

5 In fact, placing offenders in the "least restrictive and least expensive custodial setting" seemingly places the public in more immediate danger than the restrictive and costly option of placing offenders in prison. See § 17-27-101(2)(b)

Davenport, 942 P.2d at 1304; *see also Lamb v. Hopkins*, 492 A.2d 1297, 1305-06 (1985)(explaining that probation orders and statutes requiring probation officers to notify court of any probation violations created *a* duty to the court and not the general public)

The community corrections statutes do not create a class of persons requiring legislative protection and offer no indication that, in authorizing the use of community corrections, the General Assembly sought to prevent injuries such as Davenport's. *See Leake*, 720 P.2d at 162. Accordingly, we agree with the court of appeals that the community corrections statutes do not create a statutory duty of care.

B. Common Law Duty

Davenport also argues that Pikes Peak owed him a common law duty to protect him from Rutledge's misconduct. We disagree.

Where a person should reasonably foresee that his act, or failure to act, will involve an unreasonable risk of harm to another, there is a duty to avoid such harm. *See Leake*, 720 P.2d at 160. Generally, however, a person has no duty to prevent a third person from harming another absent special circumstances warranting imposition of such a duty. *See Id.; see also* Restatement (Second) of Torts § 315 (1965)[6]. We have previously focused judicial attention on the following factors in considering whether to impose an actionable common law duty on a defendant who fails to prevent a third person from harming another:

---

6 The difference between misfeasance and nonfeasance has been summarized as follows:

> In determining whether a defendant owes a duty to a particular plaintiff, the law has long recognized a distinction between action and a failure to act--that is to say, between active misconduct working positive injury to others [misfeasance] and passive inaction or a failure to take steps to protect them from

(1) the existence of a special relationship between the parties; (2) the foreseeability of harm to others; (3) the social utility of the defendant's conduct; (4) the magnitude of the burden of guarding against injury or harm; and (5) the practical consequences of placing a duty upon the defendant. *See Perreira v. State*, 768 P.2d 1198, 1214-15 (Colo. 1969); *Taco Bell, Inc. V. Lannon*, 744 P.2d 43, 46 (Colo. 1987).

Whether a special relationship exists between Pikes Peak and Rutledge depends, in large part, upon the level of control exercised by Pikes peak over its residents. *See Perreira*, 768 P.2d at 1215-16; *see also* Restatement (Second) Torts § 319 (1965). Although Pikes Peak serves a custodial role and has a contractual obligation to closely monitor the activities of its residents, Pikes Peak exerts far less control over its residents than a prison. Pikes Peak residents maintain full-time employment, provide their own transportation, and readily obtain curfew, weekend, church, overnight, and furlough passes. Thus, offenders housed at Pikes Peak spend a substantial amount of time off the premises without direct supervision. We are therefore persuaded that the level of control exerted by Pikes Peak over Rutledge is insufficient to establish a special relationship in this case. *See Baumgart v. County of Grant*, 50 Wash. App. 671, 750 P.2d 271, 274-75 (1988).

> harm [nonfeasance]." . . "The reason for the distinction may be said to lie in the fact that by 'misfeasance' the defendant has created a new risk of harm to the plaintiff, while by 'nonfeasance' he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs.

Whitlock, 744 P.2d at 57 (quoting W. Page Keeton et al., *Prosser* and *Keeton* on the Law of Torts § 56, at 373 (5th ed. 1984))

Furthermore, there is no special relationship between Pikes Peak and Davenport because Davenport did not depend upon Pikes Peak to alert him of the known and obvious dangers associated with riding in Rutledge's car after both men had been drinking. *See* Restatement (second) of Torts § 314 A cmt. b (1965)(dependence is a basis for recognition of a special relationship); *see also Mile Hi Concrete, Inc. v. Matz*, 342 P.2d 198, 203 (Colo. 1992) (explaining that "[w]hen a manufacturer or seller knows or should know of unreasonable dangers associated with the use of its product and the dangers are not obvious to product users, a manufacturer has an obligation to warn of the dangers and a breach of that obligation constitutes negligence") *Whitlock*, 744 P.2d at 62 (explaining that "[t]here exists no special relationship between the parties that justifies placing a duty upon the University to protect [plaintiff] from the well-known dangers of using a trampoline")

While it is foreseeable that reintroducing convicted criminals into the community will result in some aberrant behavior, the dangers associated with community corrections in general are insufficient to establish the requisite foreseeability needed to impose a duty of care. *See Henderson v. Gunther*, 931 P.2d 1150, 1158 (Colo. 1997) (explaining in the context of a § 1983 action that "we recognize that many state activities have the potential for creating some danger. However, not every danger or vulnerability to danger created by the State gives rise to a corresponding duty to protect") . To create such a duty, the authorities responsible for supervising the offender must or should be aware that the offender possesses a particular trait that poses a danger to the plaintiff. *See* Restatement (Second) Torts § 319. Here, Rutledge was convicted of second degree burglary and, although he was being treated for alcoholism, there are only two reported instances of his violating Pikes

Peak's alcohol policy during his eight and one-half months at Pikes Peak. In both of the instances involving alcohol use, Rutledge was disciplined. While one of these violations also involved Rutledge's use of an automobile, we find that this incident and the isolated and nonviolent behavior arising fr6m Rutledge's alcohol use do not establish that Pikes Peak knew or should have known that Rutledge posed a significant risk of harm to Davenport.

On a more general level, there is a high degree of social utility associated with community corrections programs such as Pikes Peak. Community corrections are state-funded community-based programs designed to divert offenders from correctional facilities and reintegrate incarcerated offenders into society. *See People V. Abdul*, 935 P.2d 4, 6 (Colo. 1997). As we have previously observed,

> [c]ommunity corrections programs utilize a Variety of means, including halfway houses and work release programs, to enable offenders to reside in the community. The basic objective of such programs is "to limit confinement to the extent necessary to assure reasonable supervision while permitting a gradual reintegration of the offender into the society to which the offender would eventually return"

Wilson, 747 P.2d at 640 (quoting *American Bar Association Standards for Criminal Justice*, Sentencing Alternatives and Procedures, Standard 18-2.4, Commentary *at* 102 (1986 Supp.) Community corrections programs also provide sentencing judges with an intermediate penalty that is more severe than probation, yet not as harsh as incarceration. *See Beecroft v. People*, 874 P.2d 1041, 1045 (Colo. 1994); *People ex rel. Van Meveren v. District Court*, 195 Colo. 34, 36, 575 P.2d 4, 6 (1978). Furthermore, the General Assembly has determined that direct sentencing to community cor-

rections promotes public safety by increasing the potential for victim restitution and by providing offenders with access to rehabilitation programs. *See* § 17-27-101(2) (a).

Finally, the fiscal savings associated with the community corrections program are considerable. *See* Lynn S. Branham, *A Federal Comprehensive Community Corrections Act: Its Time Has Come*, 12 T.M. Cooley L. Rev. 399, 403-07 (1995.)[7] Imposing an actionable duty in this case would have wide-ranging practical consequences in the community corrections system. Clearly, each offender sent to community corrections poses a potential danger to the public because the offender has engaged in criminal behavior in the past and is likely to have a substance abuse problem.[8] *See*

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[7] One commentator has explained that in 1993, it cost an average of $19,118.70 to confine one person in jail for a year. See Branham, *supra* at 403. Conversely, the commentator explains that

> [i]f offenders are punished in the community rather than incarcerated, they can, if employed, retain their jobs and continue working. . . . [T]here are economic benefits -- to taxpayers, to victims, and to the families of offenders. Offenders who work add, through the payment of taxes, money to the public coffers. They are also better able to pay restitution to the victims of their crimes. And they can continue to financially support their families, instead of having the taxpayers support them through welfare payments.

Id. at 407.

[8] Steven Gilmore, the director of operations at Pikes Peak, testified that approximately eighty-five percent of offenders participating in the Pikes Peak diversion program have some level of substance abuse problem.

Martinez v. California, 444 U.S. 277, 281, 100 S. Ct. 553, 62 L.#d.2d 481 (1980) (explaining that "the basic risk that repeat offenses may occur is always present in any parole system") Therefore, requiring Pikes Peak to act as the insurer of its residents would subject community corrections facilities to substantial liability exposure. Furthermore, imposition of a legal duty in this case would subvert the effectiveness of the community corrections program. Pursuant to their authority to "accept, reject or reject after acceptance the placement of any offender in its community correctional facility," each community corrections facility would be forced to screen out offenders posing a foreseeable threat to the general public, thereby limiting the number of offenders placed in the program. *See* § 17-27-103(3); *People v. Wilhite*, 817 P.2d 1017, 1019 (Colo. 1991). Once offenders are admitted into community corrections, the facility would be forced to *restrict* an offender's community access in order to limit its exposure. Besides the obvious financial burden associated with this increased supervision, program participants would be deprived of the opportunity to fully reintegrate themselves into their communities. *See Wilson*, 747 P.2d at 640.

After considering each of the factors used to determine whether a defendant owes a common law duty to prevent a third person from harming the plaintiff, we hold that the court of appeals correctly ruled as a matter of law that pikes Peak owed Davenport no duty to protect him from Rutledge's misconduct.

III.

The decision of the court of appeals is affirmed.

OPINION OF THE COLORADO COURT OF APPEALS REPORTED AT 942 P.2D 1301 (Colo. App. 1997):

COLORADO COURT OF APPEALS
CASE NO. 94 CA 1283

Eric DAVENPORT, Plaintiff-Appellee and Cross-Appellant,

V.

COMMUNITY CORRECTIONS OF THE PIKES PEAK REGION, INC., Defendant-Appellant and Cross-Appellee.

No. 94CA1283.

Colorado Court of Appeals,
Div. II.

Jan. 9, 1997.

As Modified on Denial of Rehearing

March 6, 1997.

Certiorari Granted Sept. 8, 1997.

Opinion by Judge Rothenbert.

In this negligence action, defendant, Community Corrections of the Pikes Peak Region, Inc., (Pikes Peak) appeals the judgment entered on a jury verdict finding it liable to plaintiff, Eric Davenport, for injuries he sustained in an automobile accident. Davenport cross-appeals limitations on his damages and the partial denial of his motion for payment of costs. We reverse the judgment in favor of Davenport and remand with directions to dismiss the complaint.

Pikes Peak is a private not-for-profit corporation that operates a halfway house community corrections facility under a contract with the Division on Criminal Justice of the Colorado Department of Public Safety.

On January 14, 1989, Fred Rutledge, who was then a resident of Pikes Peak's diversion program, was permitted to leave the facility on a weekend pass. Rutledge and Davenport were friends and gathered with other friends to socialize and drink. After Rutledge became intoxicated, he and Davenport left the gathering, and Davenport willingly got into Rutledge's car.

With Rutledge driving and Davenport the passenger, the two drove to a nearby liquor store to buy more beer. Rutledge lost control of his vehicle, it crashed, and Davenport suffered permanent debilitating injuries as a result of the accident.

Davenport later filed this action against Pikes Peak contending that: (1) it negligently had failed to follow statutory directives and its own policies with regard to Rutledge; and (2) Pikes Peak's failure to follow those procedures caused the accident in which he was injured. Pikes Peak designated Rutledge as a non-party at fault pursuant to § 13-21-111.5, C.R.S. (1987 Repl.Vol. 6A).

At trial, the jury found Pikes Peak liable for 90 percent of Davenport's injuries and Rut-

ledge liable for 10 percent of the injuries. It then assessed total economic damages at $435,000, damages for disfigurement at $10,000, and non-economic damages at $1,468, 000. The trial court reduced Davenport's non-economic damages to $250,000, entered judgment for him against Pikes Peak in the amount of $625,500, and awarded him costs.

I. Duty

Pikes Peak first contends the trial court erred in determining that it had a duty to protect Davenport from Rutledge's dangerous behavior. We agree.

The elements of a negligence action consist of a legal duty, a breach of the duty, causation, and damages. *Casebolt v. Cowan,* 829 P.2d 352 (Colo.1992). A negligence claim fails when it is based on circumstances for which the law does not impose a duty. *Greenberg v. Perkins,* 845 P.2d 530 (Colo. 1993).

In determining whether the law imposes a duty on a defendant, several factors are relevant, including: the risks involved, the foreseeability and likelihood of injury as weighed against the social utility of the defendant's conduct, the magnitude of the burden of guarding against the injury or harm, and the consequences of placing the burden on the defendant. *Taco Bell Inc. v. Lannon,* 744 P.2d 43 (Colo.1987).

Whether a defendant owes a plaintiff a duty to act or refrain from acting in order to avoid injury is a question of law determined by the court. *Casebolt v. Cowan, supra*

Here, in a pretrial order, the trial court determined that Pikes Peak owed a duty to Davenport, but did not clarify whether the duty was based on statutory or common law grounds. Pikes Peak asserts that neither basis supports the imposition of a duty here. We agree.

A. Statutory Duty

Pikes Peak asserts, that the statues governing the community corrections process did not impose a duty upon Pikes Peak. We agree.

Before a private tort remedy is available against a nongovermental defendant for violating a statutory duty, a plaintiff must show that: (1) he or she is a member of the class intended to be benefitted by the statute and (2) the injury suffered by the plaintiff is of the type the statute was designed to prevent. Lyons *v. Nasby,* 770 P.2d 1250 (Cole. 1989); *see* also *Allstate Insurance* Co. *v. Parfrey,* 830 P.2d 905 (Colo.1992); *Largo Corp. v. Crespin,* 727 P.2d 1098 (Colo.1986).

In construing statutes, we first examine the statutory language itself, giving words and phrases their commonly accepted and understood meaning. *Resolution Trust Corp. v. Heiserman,* 898 P.2d 1049 (Colo. 1995). Statutes relating to the same subject matter should be construed together to give effect to the legislative intent. *See R. E.N. v. Colorado Springs,* 823 P.2d 1359 (Colo.1992) (fn.5).

The legislative declaration for the community corrections statutes in effect at the time of the accident contained the following pertinent language:

> (1) It is the purpose of this article to encourage flexibility in the development of community correctional facilities and programs by the department, units of local government, and nongovernmental agencies and to encourage the use of such facilities and programs by sentencing courts. It is the further purpose of this article to provide a procedure through which units of local government and nongovernmental agencies may provide adult services to the department and to sentencing courts.
>
> (2) It is the intent of the general assembly that community correctional facilities and programs be used to *protect the public*

safety by serving the following purposes:

(a) With respect to offenders sentenced to community corrections by the courts, to provide a sentencing option and to increase the potential for ... offender access to rehabilitation programs....

Colo. Sess. Laws 1987, ch. 331, § 17-27-101 at 1824 (1st Regular Session Supp.) (emphasis added).

Another section in the community corrections statutes provided directions for administrators of community corrections facilities when reporting residents' violations of their sentencing conditions. At the time of the automobile accident, that section provided:

> Where the administrator of a community correctional facility or any other appropriate supervision authority has cause to believe that any offender placed in a community correctional facility has violated any rule or condition of his placement in that facility ... or cannot he safely housed in that facility, the administrator ... shall certify to the appropriate judicial or executive authorities the facts which are the basis for his belief and execute a transfer order ... to transport the offender to the county jail in the county in which the facility is located where he shall be confined pending a determination by the appropriate court or executive authorities as to whether or not the offender shall remain in community corrections.

Colo. Sess. Laws 1984, ch. 128, § 2 at 529-30 (presently codified with amendments at § 17-27-104(6), C.R.S. (1996 Cum.Supp.)).

Community corrections programs are intended to protect public safety. The language of the legislative declaration indicated that the General Assembly sought to achieve this goal by giving courts more sentencing options, by enabling

offenders to pay restitution to their victims, and by giving offenders greater access to rehabilitation programs. While its terms imposed duties on administrators of community corrections facilities, those duties were owed directly to the relevant judicial or executive authorities.

Section 17–27–114 specifically required an offender sentenced to a community corrections facility to comply with the rules of the facility. *Downing v. People,* 895 P.2d 1046 (Colo. 1995). Under that statute, if an administrator of a community corrections facility believed a resident had violated a condition of placement, the administrator was required to certify to the sentencing court the facts underlying the alleged violation, and to transfer the resident to the county jail pending resolution of the matter. *Wilson v. People,* 747 P.2d 638 (Colo.1987).

The purposes underlying § 17–27–114 are analogous to the purposes of probation revocations. That is, when a trial court sentences an offender to probation or to community corrections, it requires the offender to obey certain conditions. *Compare* § 16-11204, C.R.S. (1996 Cum. Supp.) *with* § 17–27-105(1)(b), C.R.S. (1996 Cum. Supp.). These conditions promote the goal of reintegrating the offender into a responsible lifestyle and protecting society against recidivism. *See People v. Ressin,* 620 P.2d 717 (Colo.1980) (probation); *Wilson v. People, supra* (community corrections).

In sum, § 17-27-114 provided a mechanism for sanctioning individuals who have violated the conditions of their placement in community corrections, and gave them an incentive to obey the terms of their placement. The statute also required the sentencing court or other referring agency to coordinate with the community corrections facilities. Although members of the general public may have been incidental beneficiaries of the statute, they were owed no actionable duty by its specific terms. *Cf Leake v. Cain,* 720 P.2d

152 (Colo.1986) *see also Lamb v. Hopkins*, 303 Md. 236, 492 A2d 1297 (1985) (Maryland statute similar to § 17-27-114 held to create a duty by probation officer to the court and not to private citizens).

We therefore hold that, because the statute evidenced neither an intent to benefit the public nor a purpose to prevent a particular harm, the statutory scheme in which § 17- 27-114 was codified did not establish a private tort remedy against community corrections facilities. *See* Colo. Sess. Laws 1977, ch. 223, § 17-27-101, et seq., at 941-47.

Accordingly, since the statute did not protect persons in Davenport's position or any other member of the general public, the trial court erred in instructing the jury there was such a duty.

B. Common Law Duty

We also agree with Pikes Peak's contention that it had no common law duty to protect Davenport from Rutledge's conduct.

Generally, a person or entity has no duty to prevent a third party from harming another. However, a duty may arise if a special relationship exists between the actor and the wrongdoer or between the actor and the victim. *Leake v. Cain, supra;* Restatement (Second) Torts § 315 (1965).

Under Restatement (Second) Torts § 319 (1965):

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

This section is not limited to persons who take charge of third parties exhibiting violent or anti-social propensities. *See* Restatement (Second) Torts § 319, illustration 1 (person carrying highly communicable disease may present significant likelihood of bodily harm to others); *see generally Nero v. Kansas State University,*

253 Kan. 567, 861 P.2d 768 (1993) (in action against a university for damages arising out of a sexual assault in university student housing, court rejected claim of special relationship between university and perpetrator; however, using landowner-invitee analysis, court found duty to use reasonable care to protect occupants of coed housing from foreseeable criminal conduct).

Rather, a special relationship may be created by a statute even under circumstances in which the statute does not specifically support a private right of action or application of the negligence *per* se doctrine. *Felger v. Board of County Commissioners*, 776 P.2d 1169 (Colo. App.1989).

According to Davenport, because Pikes Peak had control over Rutledge and knew or should have known he was potentially dangerous, Pikes Peak had a special relationship with Rutledge. Thus, Davenport argues, Pikes Peak had a duty to protect the public from Rutledge. We are not persuaded.

Davenport's reliance on *Perreira v. State*, 768 P.2d 1198 (Colo. 1989) is misplaced. There, the supreme court held that psychiatrists who had treated and released an involuntarily hospitalized mental patient owed an actionable duty to the surviving spouse of a police officer killed by the mental patient shortly after the patient's release.

However, the patient in *Perreira* was hospitalized in part because of his violent behavior. Additionally, the patient had paranoid delusions that police were harassing him. And, throughout his hospitalization, the patient deteriorated, increasingly blaming the police for his physical ailments and missing property. He also expressed an intent to reacquire the gun which police had taken from him during an earlier arrest. Four months after his release from the mental hospital, the patient shot and killed a police officer during an altercation at a conven-

ience store.

In the negligence action brought by the policeman's widow against the treating psychiatrists, the jury found for the plaintiff. On appeal, the supreme court rejected the psychiatrists' contention that they had no actionable duty to protect members of the public from the released patient. It found they had a duty: (1) to exercise due care consistent with the knowledge and skill ordinarily possessed by psychiatric practitioners under similar circumstances in determining whether the patient had a violent propensity which would create an unreasonable risk of serious bodily harm to others; and (2) to take reasonable precautions to protect the public from the danger created by the release of the patient. *Perreira v. State, supra.*

The court based this duty on the weighing of several factors including: the relationship between the psychiatrist and patient; the foreseeability of the serious bodily harm to others resulting from the psychiatrist's decision to release the patient; the social utility of the psychiatrist's decision to release a mentally ill patient from involuntary commitment; the magnitude of any burdens that might devolve on a psychiatrist by virtue of a legal duty of due care in determining whether to release the patient; and the practical consequences of imposing such a duty. *Perreira v. State, supra.*

Although the principles articulated in *Perriera* guide us, we conclude that the facts here are sufficiently distinguishable so as to result in a finding of no duty to this plaintiff.

In a decision involving very similar facts, a Washington appellate court applied the same basic principles used in Colorado and also found no duty. We find that court's analysis helpful here.

Baumgart v. Grant County, 50 Wash.App. 671, 750 P.2d 271 (1988) involved an inmate at a county jail who was prematurely released from jail. Later, he became intoxicated and was in-

volved in an automobile accident in which the plaintiff was injured. Like Rutledge, the inmate in *Baumgart* had a history of alcohol-related offenses and was supposed to have been on antabuse, a drug used in the treatment of alcoholism, while he was in custody. And like Rutledge, the inmate in *Baumgart* was in custody for burglary and not an alcohol-related offense.

The *Baumgart* court held that the plaintiff had failed to show sufficient legal causation for the injury, and that any duty was too remote to establish the defendant's liability. In so holding, the court stated that:

> Legal causation ... rests on policy considerations as to how far the consequences of defendant's acts should extend. It involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. If the factual elements of the tort are proved, determination of legal liability will be dependent on (mixed considerations of logic, common sense, justice, policy, and precedent.)

Baumgart v. Grant County, supra, 50 Wash. App. at 674, 750 P.2d at 273 (quoting *Hartley* v. *State*, 103 Wash.2d 768, 779, 698 P.2d 77, 83 (1985)). This causation analysis closely parallels the test used in Colorado for determining the scope of a duty. *See Taco Bell v. Lannon, supra.*

We reach the same conclusion here as did the *Baumgart* court. Like the inmate in *Baumgart* but unlike the mental patient in *Perreria*, Rutledge was confined at Pikes Peak for punitive correction after having been found guilty of burglary. The burglary was not indicative of the kind of behavior which led to the accident injuring Davenport.

Further, the special relationship between Pikes Peak and Rutledge was discernibly less custodial than the involuntary hospitalization involved in *Perreira* or even the custodial relationship between a jailer and a prisoner in a

traditional correctional facility. While Rutledge was provided with alcohol-related therapy, he was not exposed to the intense type of psychiatric examination that an involuntarily committed mental patient presumably would have been provided. Rutledge's custodians also were less well-equipped to diagnose his potentially dangerous propensities than were the psychiatrists in *Perreira*, and they acted within their authority in permitting Rutledge to leave the halfway house. *See Baumgart v. Grant County, supra; see also Moore v. Commonwealth Department of Justice*, 114 Pa. Cmwlth. 56, 538 A.2d 111 (1988).

Also missing here is the degree of foreseeability found in *Perreira*. While Rutledge had been charged with drinking and driving, the driving related charges had been dismissed. Rutledge's sentence to Pikes Peak was based on his conviction for burglary and his punishment was unrelated to his alcoholism. Before the accident, Rutledge was found to have consumed alcohol only on two occasions during the year he resided at Pikes Peak, and many of his other violations of Pikes Peak's rules involved the failure to take antabuse and were unaccompanied by evidence that he had consumed alcohol.

Nor did Rutledge display any bizarre, violent, or aberrant behavior, or any other symptom of alcoholism that would set him apart from numerous other community corrections residents with substance abuse problems. *Compare Perreira v. State, supra, with Baumgart v. Grant County, supra.*

Thus, the linkage between Pikes Peaks' allegedly negligent conduct and the later automobile accident is too attenuated for us to conclude that Rutledge's conduct and Davenport's injuries were reasonably foreseeable to Pikes Peak. *Cf. Casebolt v. Cowan, supra* (trial court erred in granting summary judgment on the duty question in a negligent entrustment case because material questions of fact remained).

A contrary holding would impose upon every halfway house and community corrections facility the choices of acting as an insurer against the negligent conduct of its residents, or imposing substantial restrictions on its residents' access to the outside community. Both alternatives would frustrate the legislative purpose underlying the establishment of community corrections as a sentencing alternative. The threat of boundless liability for a resident's or former resident's conduct also would threaten the financial stability of the community corrections industry, making community corrections a far more costly sentencing option. The alternative of curtailing community corrections residents' access to the outside community would frustrate the legislative goal of reintegrating residents into the law abiding community and encouraging them to remain gainfully employed.

Accordingly, as in *Baumgart*, logic, justice, and common sense persuade us that Pikes Peak had no duty to protect Davenport from Rutledge's negligence. *Baurngart v. Grant County, supra; see generally* Annot., *Liability of Private Operator of "Halfway House" or Group Home Housing Convicted Prisoners Before Final Release for Injury to Third Person Caused by Inmate*, 9 A.L.R. 5th 968 (1993).

II.

Because Pikes Peak did not argue on appeal that it was immune from liability under an extension of the doctrine of quasi-judicial immunity or official discretionary immunity, we do not address the issue.

Pikes Peak's other contentions of error are moot as are Davenport's contentions on cross-appeal, and we do not address them.

The judgment is reversed and the cause is remanded with directions to dismiss the complaint for failure to state a claim on which relief can be granted.

JONES and BRIGGS, JJ., concur.

ORDER ON REHEARING:

SUPREME COURT, STATE OF COLORADO
CASE NO 97SC266
CERTIORARI TO THE COLORADO COURT OF APPEALS,
94CA1283
DISTRICT COURT, EL PASO COUNTY, 90CV3896
ORDER OF COURT

ERIC DAVENPORT, Petitioner,
V.
COMMUNITY CORRECTIONS OF THE PIKES PEAK REGION, INC., Respondent

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Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that the Opinion is modified, and as modified, the Petition for rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JULY 27, 1998.

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CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE WITH APPROPRIATE CITATIONS:

PROVISIONS OF UNITED STATES CONSTITUTION:

AMENDMENT VII OF THE UNITED STATES CONSTITUTION:
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV OF THE UNITED STATES CONSTITUTION:
Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PROVISIONS OF COLORADO CONSTITUTION:

ARTICLE II, BILL OF RIGHTS:

In order to assert our rights, acknowledge our duties, and proclaim the principles upon which our government is founded, we declare:

Section 1. *Vestment of political power.* All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

...

Section 3. *Inalienable rights.* All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.

...

Section 6. *Equality of justice.* Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.

...

Section 11. *Ex post facto laws.* No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly.

...

Section 14. *Taking private property for private use.* Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes.

Section 15. *Taking property for public use - compensation, how ascertained.* Private property shall not be taken or damaged, for public or pri-

vate use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

...

Section 23. *Trial by jury - grand jury.* The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve persons, as may be prescribed by law. Hereafter a grand jury shall consist of twelve persons, any nine of whom concurring may find an indictment; provided, the general assembly may change, regulate or abolish the grand jury system; and provided, further, the right of any person to serve on any jury shall not be denied or abridged on account of sex, and the general assembly may provide by law for the exemption from jury service of persons or classes of persons....

Section 25. *Due process of law.* No person shall be deprived of life, liberty or property, without due process of law.

ARTICLE III, DISTRIBUTION OF POWERS:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in

this constitution expressly directed or permitted.

ARTICLE V, LEGISLATIVE DEPARTMENT:

Section 25. *Special legislation prohibited.* The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say; for granting divorces; laying out, opening, altering or working roads or highways; vacating roads, town plats, streets, alleys and public grounds; locating or changing county seats; regulating county or township affairs; regulating the practice in courts of justice; regulating the jurisdiction and duties of justices of the peace, police magistrates and constables; changing the rules of evidence in any trial or inquiry; providing for changes of venue in civil or criminal cases; declaring any person of age; for limitation of civil actions or giving effect to informal or invalid deeds; summoning or impaneling grand or petit juries; providing for the management of common schools; regulating the rate of interest on money; the opening or conducting of any election, or designating the place of voting; the sale or mortgage of real estate belonging to minors or others under disability; the protection of game or fish; chartering or licensing ferries or toll bridges; remitting fines, penalties or forfeitures; creating, increasing or decreasing fees, percentage or allowances of public officers; changing the law of descent; granting to any corporation, association or individual the right to lay down railroad tracks; granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. In all other cases, where a general law can be made applicable no special law shall be enacted.

PROVISIONS OF COLORADO STATUTES:

Section 17-27-115, Colorado Revised Statutes: Where the administrator of a community correction facility or any other appropriate supervision authority has cause to believe that any offender placed in a community correctional facility has violated any rule or condition of his placement in the facility... or cannot be safely housed in that facility, the administrator... shall certify to the appropriate judicial or executive authorities the facts which are the basis for his belief and execute a transfer order... to transport the offender to the county jail in the county in which the facility is located where he shall be confined pending a determination by the appropriate court or executive authorities as to whether or not the offender shall remain in community corrections.